

Herbenson v Carrolls Corp.

2011 NY Slip Op 34167(U)

November 22, 2011

Supreme Court, Schenectady County

Docket Number: 2010-76

Judge: Vincent J. Reilly

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STATE OF NEW YORK
SUPREME COURT COUNTY OF SCHENECTADY

PATRICIA HERBENSON,

Plaintiff,

DECISION/ORDER

-against-

Index No. 2010-76
RJI No. 46-1-10-0589
Hon. Vincent J. Reilly Jr.

CARROLLS CORPORATION,

Defendants.

APPEARANCES:

Rutberg & Associates PC
For Plaintiff
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Poughkeepsie, NY 12601

Smith, Sovik, Kendrick & Sugnet, PC
For Defendant
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REILLY JR.,

Plaintiff commenced this action alleging that she sustained personal injuries as the result of consuming a contaminated mozzarella stick that she purchased at the drive-through of defendant's Burger King restaurant located in the City of Schenectady. Based upon the allegation that the mozzarella stick was unfit for human consumption because it was tainted with degreasing fluid, the complaint sets forth three causes of action sounding in negligence, breach of implied warranty and strict products liability. Following joinder of issue, plaintiff moved for partial summary judgment in her favor on the issue of liability and defendant cross-moved for an order compelling plaintiff to respond to its first set of interrogatories. By decision and order dated September 30, 2010, this Court denied plaintiff's motion and granted defendant's cross motion.

Thereafter, plaintiff served defendant with various discovery demands including a notice to produce dated November 22, 2010. Defendant took the position that the production of certain

confidential and proprietary materials was required in response to certain paragraphs of the notice to produce, namely Paragraph 7 which demands the production of documents provided to the Department of Health during its investigation of the incident, Paragraph 12 which demands the production of defendant's cleaning procedures in place at the time of the accident, and paragraph 14 which demands copies of any document which describes the procedures that defendant's employees were required to follow in the event of a consumer complaint of tainted food. Defendant accordingly conditioned its response to these paragraphs upon plaintiff's execution of a confidentiality agreement which provided that any document deemed confidential by defendant could only be used and disclosed by plaintiff within the context of the present litigation. Plaintiff refused to execute the agreement, prompting defendant to file the present motion pursuant to CPLR 3103 for an order declaring the responsive documents in question are confidential or proprietary in nature and issuing a protective order prohibiting plaintiff from re-disclosing the documents outside of this litigation, including any documents that plaintiff may have obtained through a FOIL request to the Department of Health. Defendant also seeks an order requiring that any such documents deemed confidential or proprietary be returned or destroyed at the conclusion of litigation. Plaintiff opposes the motion.

Initially, at or around the return date of defendant's motion, plaintiff served a second notice to produce which demanded that defendant provide the address for each Burger King franchise owned and/or operated by defendant and identify each and every complaint of foreign substances claimed to have been in food with respect to each of those franchises, including the name of the claimant and the date and description of each incident. Defendant objected to the demand as unduly burdensome and not material and necessary to the prosecution of the action. The Court permitted the parties to informally brief their arguments in this regard and will now address the dispute herein.

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CPLR 3101(a) requires “full disclosure of all matter material and necessary in the prosecution or defense of an action.” However, the statute also authorizes the court to “make a protective order denying, limiting, conditioning or regulating the use of any disclosure device.” (CPLR 3101 [a]). In determining whether disclosure is warranted, “[t]he test is one of usefulness and reason” (Scalone v Phelps Memorial Hosp. Ctr., 184 AD2d 65, 70). The court must balance the importance of the plaintiff’s need for disclosure against any adverse consequences of disclosure to the defendant (see, Feger v Warwick Animal Shelter, 59 AD3d 68, 70). It is well settled that the scope and supervision of discovery is generally left to the broad discretion of the trial court, and absent an abuse of that discretion the Court’s decision will not be disturbed (see, Carella v King, 198 AD2d 567).

Here, with regard to the first notice to produce, defendant is willing to disclose the material sought by plaintiff but requests an order conditioning such disclosure upon plaintiff’s execution of a confidentiality agreement which would limit plaintiff’s use of any information obtained to the confines of this lawsuit and would prohibit her from disseminating re-disclosing any such information outside of this litigation. As the basis of this request, defendant submits evidence that its franchise agreement prohibits it from disclosing the information sought by plaintiff. In the Court’s view, defendant has made an appropriate factual showing to support the conclusion that requiring disclosure of the information sought without limitation would cause undue prejudice to defendant because it would likely result in a breach of its franchise agreement. Under these circumstances and balancing the interests of full disclosure against the need to prevent unnecessary prejudice to defendant, the appropriate remedy is to deem the information requested confidential and to limit its use to the confines of this lawsuit (see, Gray v LaChase Construction Servs., 31 AD3d 983; Butt v New York MEd. Coll., 7 AD3d 744). The proposed confidentiality agreement is reasonable in its restrictions and would prevent any undue

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prejudice to defendant. In the exercise of its discretion, the Court accordingly directs and conditions defendant's disclosure of documents in response to paragraphs 7, 12 and 14 of plaintiff's notice to produce upon plaintiff's execution of the proposed confidentiality agreement. The Court further directs that the information produced must either be destroyed or returned to defendant at the conclusion of litigation.

Turning to the second notice to produce, in light of the fact that defendant owns 315 Burger King franchises across 12 states and that the demand for similar incidents is unlimited as to time, the Court agrees that the notice to produce is patently overbroad and unreasonably burdensome. The Court deems it reasonable and appropriate to limit the notice to produce to complaints of any foreign and/or toxic substances in the food at the single franchise location where the incident in this case occurred during the three-year period prior to plaintiff's alleged injury. Such disclosure shall include the name of the claimant and the date and description of the incident.

For the foregoing reasons, it is


ORDERED that defendant's motion is granted, without costs, and defendant is directed to respond to paragraphs 7, 12 and 14 of plaintiff's notice to produce dated November 22, 2010 only upon plaintiff's execution of the proposed confidentiality agreement, and it is further

ORDERED that plaintiff's notice to produce dated July 26, 2011 is limited as set forth in this Court's decision.

THIS DECISION SHALL CONSTITUTE THE ORDER OF THE COURT. THE ATTORNEYS FOR DEFENDANT SHALL ENTER THIS ORIGINAL DECISION/ORDER WITHIN 20 DAYS OF ITS DATE AND PROVIDE A COPY WITH PROOF OF ITS ENTRY ON THE OPPOSING ATTORNEY(S) OR THE PRO SE LITIGANT(S), AS THE CASE MAY BE.

Dated: 11/22/11

ENTERED


HON. VINCENT J. REILLY JR.
Supreme Court Justice